IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 648 OF 1996

1. Raju Jeevan Chavan,

2. Smt.Neeta Bhim Ghenger (Ghenget),

Both residing at House No.5,
Kamble Road, M.G.Road, Pune,
(Presently at Yerawada Central
Prison, Pune). ... Appellants.

V/s.

The State of Maharashtra. ... Respondent.

None for the appellants.

Ms.P.H.Kantharia, A.P.P. for the State.

CORAM : V.G.PALSHIKAR AND
V.C.DAGA, JJ.

DATED : 8th June, 2005.

JUDGMENT : (Per V.C.Daga, J.)

. This appeal at the instance of the accused Nos.1 and 2, appellants herein is directed against their conviction under section 302, 341 read with 34 of the Indian Penal Code ("I.P.C." for short) under section 235(2) of Code of Criminal Procedure, 1973 ("Cr.P.C." for short) recorded by the Additional Sessions Judge, Pune on 24th October, 1996 in the Sessions Case No.175 of 1994.

FACTUAL MATRIX :

2. Sharifa - deceased was serving as Sweeper in the hospital run by the Corporation. She was appointed in place of her husband, accused No.1, since he had formed an habit of remaining absent. She used to give Rs.300/- per month to her husband, accused No.1 to meet his financial requirement. Sharifa had two issues one Javed and another Imtiaz from accused No.1. She also had one daughter by name Mumtaz from her first husband. Mumtaz was residing with Sharifa's mother in her house.

3. The accused No.1 started doubting character of his wife - Sharifa. He used to beat her. She, left with no alternative, was required to shift with children to a room in Porter's Chawl next to her mother's room. Accused No.1 used to frequently visit her at her Porter's Chawl residence.

4. On 8th May, 1994, she was having night duty. On completing her night duty, she returned to her house on 9th May, 1994. At that time, her mother, Javed and Imtiaz were away from house. At about 1.00 p.m., after taking meal; she went to bed. At about 2.00 p.m. her husband, accused No.1 along

with his sister i.e. accused No.2 came to her house. Both of them asked her to agree for divorce. Sharifa refused to agree. This resulted in hot exchange of words. Accused No.1 threatened to finish her. This threat took a serious turn. Accused No.1, during the course of hot exchange of words with Sharifa, poured kerosene on her person and set her on fire with matchstick. When Sharifa was in flames, naturally, to save her life she tried to come out of her house crying for help. But accused No.2 pushed her inside the house and prevented her from coming out. When both of them were sure that Sharifa was completely burnt they ran away from the spot.

5. The neighbours, who had gathered on the spot, extinguished fire with which Sharifa was burning. Hearing the shouts of Sharifa, her daughter Mumtaz came to her room. She took Sharifa to Sasoon Hospital in the auto-rikshaw. She was admitted in the said hospital. After completing certain formalities, Mumtaz came back since she had left her child at home.

6. The Police Constable Mr.Lokhande informed the Bund-Garden Police Station and also to police chowky on telephone that Sharifa was admitted in

Sasoon Hospital for burn injuries. The said information was received by Police Sub-Inspector Mr.Bhagat, who was in-charge of the Station Road - Police Chowky. He, then, made enquiry as to availability of Special Judicial Magistrate ("S.J.M." for short) to record dying declaration of the victim. Finding presence of S.J.M. at the Sasoon Hospital, he reached the hospital. He met S.J.M. - Mr.Khomane in the hospital. He gave him necessary requisition to record dying declaration of Sharifa. He also met the Medical Officer on duty. He requested him to examine Sharifa and to certify whether she was mentally and physically fit to give her statement.

7. Dr.Vikramaditya, accordingly, examined Sharifa. He certified her to be fit to give her dying declaration. Mr.Bhagat (P.S.I.) requested Mr.Khomane (S.J.M.) to record her dying declaration and told him that he would be waiting for him on the ground floor of the hospital.

. Mr.Khomane after recording her statement came down and handed over the same to Mr.Bhagat.

8. Mr.Bhagat, thereafter, again went to the Medical Officer and requested him to examine Sharifa and certify her physical and mental condition and to

find out whether she was in a condition to give her statement. Dr.Vikramaditya again examined her and certified her to be fit for giving her statement. Complaint of Sharifa was taken down in presence of the Medical Officer, who made necessary endorsement thereon certifying her fitness to give statement. The complaint of Sharifa was, thereafter, sent to the Bund Garden Police Station for registration of offence which came to be registered as C.R.No.115/1994.

9. Mr.Bhagat (P.S.I.), thereafter, went to the spot of incident. On the spot of incident a plastic can, one matchstick box, some partly burnt pieces of matchsticks, pieces of nylon saree and bangles were noticed by him, which he collected and attached. He, then, recorded statements of Mumtaz, Chhaya and others.

10. On 12th May, 1994 at about 11.40 Sharifa died because of heavy burn injuries. Inquest panchanama of the dead body was done. The Head Constable sent the dead body for post-mortem. The post-mortem was, accordingly, conducted by the Medical Officer. An Advance Certificate was issued by him. The cause of death as per this certificate

was shown as shock due to burn injuries as burn injuries were almost more than 88%.

11. The offence which was registered was converted into an offence under section 302 of I.P.C. In the meantime, the articles attached by Mr.Bhagat (P.S.I.) were sent for chemical analysis. The report of Chemical Analyser was received; which certified detection of kerosene on the attached articles. Thus, according to the prosecution, since Sharifa was not ready and willing to give divorce, accused No.1 poured kerosene on her person and set her on fire and accused No.2 helped him to commit the offence for which accused persons were charged.

12. On completion of the investigation, charge-sheet was submitted. In due course, the case was committed to the Court of Sessions at Pune. Charges framed against the accused were read over and explained to them in vernacular. Their plea was recorded. Defence of the accused was of total denial. They claimed to be tried.

13. After recording the evidence of the witnesses led by the prosecution, the statement of the accused under section 313 of Cr.P.C. was

recorded. The defence story sought to be developed was that while cooking meal on the stove, a plastic can containing kerosene was slipped from the hands of Sharifa on burning stove. The stove got burst and Sharifa received burn injuries and because of these injuries she died.

14. The learned trial Judge, after hearing both sides, was pleased to record finding of guilt against both accused holding that the prosecution has proved that in furtherance of common intention accused Nos.1 and 2 committed murder of Sharifa Raju Chavan and thereby committed offence punishable under section 302 read with section 34 of I.P.C.

15. The above verdict of conviction recorded by the Sessions Court is the subject matter of challenge in the present appeal at the instance of the appellants (accused Nos.1 and 2).

16. The appellants are absent. Their advocates are also absent. None appears for the appellants when the appeal is called out for hearing though both of them have put up their appearance through their counsel.

17. It appears that since the appellants are on bail, they are not diligent in prosecuting their appeal. The matter being old, this Court with the assistance of the learned A.P.P. went through entire evidence and record as also the judgment and order of the trial Court.

18. The prosecution in support of its case examined Dr.Vikramaditya, Medical Officer, B.J.Medical College, Pune (P.W.1), who had attended and examined the victim and found her to be conscious throughout when her statement was recorded and certified to that effect before the dying declaration was recorded. Her fitness and mental condition was also certified even after her dying declaration was recorded. All these three certificates were proved by him and marked as Exh.13, 14 and 15. He was extensively cross-examined by the defence counsel, however, he could not elicit any evidence from him worth supporting the case of the defence. The reading of the cross-examination would show that the witness has stood to the test of cross-examination and has proved the case of the prosecution.

19. Mr.Jaywant Haribhau Khomane (P.W.2) is a Special Judicial Magistrate. A requisition letter,

given to him by the Police on 9th May, 1994 by the Bund Garden Police Station, to record dying declaration of Sharifa, was produced and proved by him at Exh.18. There was endorsement on the said letter evidencing receipt of the letter on 9th May, 1994 at 5.15 p.m. in Sasoon Hospital, Pune. He deposed that he went to the Burns Ward No.27; met the Medical Officer on duty and informed him that he had to record dying declaration of Sharifa Raju Chavan. The Medical Officer took him to the patient-Sharifa, examined her and told him that she was conscious and able to give her statement. Accordingly, Medical Officer made endorsement (Exh.13) in his presence. Certain questions, put by Mr.Khomane (S.J.M.), were answered by her to his satisfaction. He also enquired from the patient as to whether there was any pressure on her to give any statement to which she replied in negative. The statement given by her was read over to her; which she admitted to be correct, and, thereafter, she signed the said statement. Mr.Khomane (P.W.2) has stated that when the dying declaration of Sharifa was being recorded, the Medical Officer was present during that period. After taking signature of the victim again the Medical Officer examined her and made his endorsement (Exh.14) certifying her fitness.

He has stated that the dying declaration was started at 5.30 p.m. and completed at 5.50 p.m. The same was proved and marked as Exh.19. Mr.Khomane was cross-examined by the defence counsel but nothing could be elicited in favour of the defence. In other words, this witness also stood to the test of cross-examination and proved the prosecution case in toto.

20. The third witness, who was examined, was Mumtaz Jamal Sayyed (P.W.3), a daughter of deceased Sharifa. She proved her presence in the house at the time of incident. She deposed that accused No.1 was insisting her mother for divorce and to change the names of the issues as they were using his name as father's name. Her mother was not ready to accept either of the proposals. She also deposed arrivals of the accused at the house of deceased on 9th May, 1994 at 2.00 p.m. and confirmed that during the course of hot exchange of words the accused had threatened Sharifa to eliminate her. This episode took ugly turn when accused No.1 took a can containing kerosene and poured it on her person and set her on fire. When her mother i.e. victim was in flames; she (i.e. Sharifa) tried to go out of the house to seek help but she was prevented and pushed

inside the house by accused No.2. When her mother shouted for help, the neighbouring ladies came on the spot. In the meanwhile, both accused ran away from the scene. The fire was extinguished. The victim was taken to the Sasoon Hospital. Mumtaz (P.W.3) has given a graphic description of the events in her evidence.

21. Mumtaz was also cross-examined by the defence counsel. In the cross-examination she stated that on the date of incident she herself and her mother - deceased Sharifa were present in the house. Her grandmother, maternal uncle, his wife and Javed had gone to attend one marriage. Imtiaz, daughter of deceased Sharifa was with her, who was playing with her son outside the house. Mumtaz has also described the situation of the house. She also deposed that hearing shouts of her mother she came out of her house. At that time her mother was in the house but in flames. She also deposed that when she came out of the house her mother and accused Nos.1 and 2 were in the house. She also deposed that on the side of lavatory two ladies by name Kesharbai and Chhayabai were standing. She has also proved that the accused No.1 was on visiting terms with her mother but the relations were not cordial. Every time accused No.1

used to insist for divorce and her mother was unwilling to give divorce. She deposed that this refusal has resulted in setting her on fire by accused No.1. She also proved that accused Nos.1 and 2 had common intention to kill the deceased Sharifa. She denied the suggestion given to her that she was not present in the house at the time of incident.

22. In addition to the above witness-Mumtaz; one more witness by name Chhaya Vijay Darshe (P.W.4) was also examined. She deposed that on the date of incident she was going to the shop to purchase kerosene. She saw accused Nos.1 and 2 going towards to the house of Sharifa. After about an hour while returning when she was crossing the house of Sharifa; she saw the quarrel going on between Sharifa and accused Nos.1 and 2. By the time she reached her house and put the can of kerosene; she heard shouts of Mumtaz. Immediately, she came to the door of house of Sharifa. She saw that Sharifa was in flames. Accused No.1 was in the house and accused No.2 was standing in the door. Thus, Chhaya (P.W.4) has also proved the presence of accused Nos.1 and 2 on the scene of the incident. She also deposed that accused No.2 was pushing Sharifa inside the house and none of them tried to extinguish fire. She deposed

that Mumtaz ran away and brought one auto-rikshaw and took her mother to the hospital.

23. Chhaya was cross-examined. In her cross-examination; she stated that if one sits in her house, one can see as to what is going on in the house of Sharifa. She also stated to be acquainted with Sharifa and her mother. She also affirmed in her cross-examination that she personally saw exchange of hot words and abuses between accused No.1 and deceased Sharifa. She also stated that accused No.1 used to beat Sharifa. She denied that accused Nos.1 and 2 were not present at the time when the incident took place.

24. The evidence of the witnesses (P.W.1 to P.W.4) unequivocally establishes presence of accused Nos.1 and 2. It also proves the quarrel between the deceased Sharifa and accused No.1. Mumtaz (P.W.3) and Chhaya (P.W.4) both of them have proved strained relations between the victim and the accused No.1. They have also proved presence of accused Nos.1 and 2 when deceased Sharifa was in flames and that none of them made any attempt to extinguish flames. Chhaya (P.W.4) has also proved to have seen accused No.2 pushing the victim-Sharifa inside the house when she

was trying to come out of the house to seek help so that somebody could help her and extinguish flames.

25. Another witness is Dr.Vinayak Dinkar Kulkarni, who, at the relevant time, was attached to the Sasoon Hospital, Pune. He performed post-mortem on the dead body of Sharifa. He has stated that the dead body had 88% burn injuries, which were sufficient in the ordinary course to cause death. He also deposed that a person with 80% burn injuries can remain conscious.

26. P.S.I. - Mr.Parmeshwar Baburao Bhagat (P.W.6) was also examined in support of prosecution case since he had investigated the crime. He also stood to the test of cross-examination and proved prosecution version.

27. It is needless to mention that during the course of examining the evidence in general and Exh.19 and 25 in particular, we did notice some discrepancy with respect to time of recording statement of the victim. In the dying declaration of the deceased (Exh.19), recorded by the S.J.M. on 9th May, 1974, the time of recording is mentioned as 5.30 p.m.; whereas the statement of the deceased which

was recorded subsequent to the recording of dying declaration on 9th May, 1994 (at the bottom of the statement just above the signature), mentions the time as 3.45 p.m., which is obviously incorrect. It seems that while recording time, instead of 5.45 p.m., it came to be recorded as 3.45 p.m., may be by slip of pen as per the submission of learned A.P.P. However, the said discrepancy cannot be said to be such which will shatter and wipe out the legal effect of the dying declaration of the deceased. This small discrepancy is not sufficient to take away the strength of legal evidence in the form of the dying declaration corroborated by other legal evidence.

28. Having examined the contents of the dying declaration in the light of the deposition of Mr.Khomane (S.J.M.), it is clear that he has followed legal formalities and procedure before and after recording dying declaration. In the dying declaration the deceased has categorically stated that past 2-3 days accused No.1 was insisting for divorce to which she did not agree. She also stated that accused No.2 was present on the date of incident i.e. 9th May, 1994 when the accused No.1 insisted for divorce, which she had refused to give. She also stated that when this exchange of hot words was going

on, a kerosene was poured on her person by accused No.1 and she was set on fire by him and that she was prevented from coming out of the house by accused No.2. There is absolutely no discrepancy in the dying declaration. Prior to the recording of dying declaration, and subsequent thereto, the Medical Officer on duty had examined Sharifa and certified her physical and mental condition being proper to give dying declaration. The certificate issued by the doctor on both occasions are proved and marked as Exh.13 and 14.

29. The trial Court after appreciating the evidence has recorded finding of guilt and held that the offences committed by accused Nos.1 and 2 were proved beyond doubt. The dying declaration is a truthful and trustworthy piece of evidence. There is ample corroborative evidence available on record, as sketched hereinabove, to support the version of the victim recorded in the dying declaration. If the dying declaration is truthful and trustworthy there is no need of corroboration. As per law laid down by the Apex Court in the case of **Girdhar Shankar Tawade v. State of Maharashtra**, 2002 Cr.L.J. 2814, the dying declaration solely can be relied upon, if it is a trustworthy piece of evidence.

30. This case stands on a higher footing. In the instant case there is not only a strong piece of evidence in the form of trustworthy and truthful dying declaration but there is ample evidence to corroborate the same. The findings recorded by the trial Court can very-well be sustained. In the result, for the reasons recorded herein as well as for the reasons recorded by the trial Court this Court is of the opinion that the appellants/accused have failed to make out any case to interfere with the impugned judgment and order recording verdict of guilt. Conviction of both accused is liable to be sustained.

31. In the result, appeal is dismissed.

. Both the appellants/accused are directed to surrender before the trial Court immediately. On accused surrendering before the trial Court, bail bonds of the accused to stand cancelled.

(V.C.DAGA, J.) **(V.G.PALSHIKAR, J.)**